

Office of the Attorney General  
State of Tennessee

\*1 Opinion No. 99-022  
February 9, 1999

Confidentiality of 911 Tapes Being Used in Pending Criminal Investigations.

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QUESTION

Can 911 tape recordings of telephone communications and radio transmissions be withheld from public disclosure when a criminal investigation involving such recordings is being conducted? If so, does this include withholding the recordings from defense attorneys, media and persons directly involved in or the subject of the investigation.

OPINION

A 911 tape made or received by a state or local government agency in connection with the transaction of its official business would be a public record open for inspection pursuant to Tenn. Code Ann. § 10-7-503 and copying pursuant to Tenn. Code Ann. § 10-7-506, "unless otherwise provided by state law." Tennessee court rules of procedure, which have the force and effect of state law, as well as applicable statutes or common law, may provide an exception to the Public Records Act. The availability of the tape must, therefore, be determined on a case-by-case basis.

ANALYSIS

Section 10-7-503 of Tennessee Code Annotated provides that "[a]ll state, county and municipal records ... shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee ... unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a). The proper test in determining whether material is a public record is whether it was made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency. *Griffin v. City of Knoxville*, 821 S.W.2d 921, 924 (Tenn. 1991).

This office has previously opined that, under *Griffin*, a 911 tape made or

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received by a state or local government agency in connection with the transaction of its official business would be a public record open for inspection pursuant to Tenn. Code Ann. § 10-7-503 and copying pursuant to Tenn. Code Ann. § 10-7-506, unless otherwise provided by state law. [FN1] Op. Tenn. Atty. Gen. **93-65** (November 29, 1993) (copy attached); see also *Memphis Publ. Co. v. City of Memphis*, 871 S.W.2d 861 (Tenn. 1994) (enforcing a broad interpretation of the term "records").

In Tenn. Code Ann. § 10-7-504, the General Assembly has provided exceptions to the public availability of records. No exception for "911 tapes" per se appears in this statute. The exceptions set forth in Tenn. Code Ann. § 10-7-504 are not exclusive, however, and statutes, rules and the common law dealing with the subject matter in question also must be examined when determining whether a 911 tape is available as a public record.

In *Appman v. Worthington*, 746 S.W.2d 165, 166 (Tenn. 1987), for example, the Tennessee Supreme Court held that the Tennessee Rules of Criminal Procedure have the force and effect of state law. See also *Ballard v. Herzke*, 924 S.W.2d 652, 662 (Tenn. 1996) (applying same holding to the rules of civil procedure). The Court in *Appman* held that documents in an active criminal case which would not be subject to discovery and inspection under Tennessee Rule of Criminal Procedure 16 are not subject to inspection under the public records act. 746 S.W.2d at 166. The Court reasoned that the protection in Rule 16 of certain material from discovery constituted an exception to the Public Records Act. *Id.* Thus, if the 911 tape is part of an active criminal prosecution, the Tennessee rules of discovery may impact whether it can be disclosed.

\*2 In addition to Tennessee court rules, state statutes may also prevent disclosure under the public records act. For example, if the tape is part of an investigative record of the Tennessee Bureau of Investigation, Tenn. Code Ann. § 10-7-504(a)(2) requires that the "information in such records shall be disclosed to the public only in compliance with a subpoena or an order of a court of record."

Finally, the common law may affect availability of a 911 tape. For example, the common law recognizes a privilege for investigative records relating to pending criminal prosecutions. See, e.g., *Jennings v. Johnson*, 480 F.Supp. 47 (E.D. Tenn. 1979) (common law prevents discovery of TBI records in an open criminal case).

Therefore, whether a defendant, the public or the media must be given access to a 911 tape which is part of a pending criminal investigation would hinge upon whether the record was excepted from public disclosure under rule, statute or common law. That question can only be answered on a case-by-case basis.

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[FN1]. The definition of a "public record" expressly includes sound recordings such as a 911 tape. Tenn. Code Ann. § 10-7-301(6).

Tenn. Op. Atty. Gen. No. 99-022, 1999 WL 98339 (Tenn.A.G.)

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